On January 26, 2004, Mr. and Mrs. Craig re-filed their Motion for Judgment in the Circuit Court of Fairfax County in the present matter. Mr. and Mrs. Craig filed claims for breach of warranty, violation of the Virginia Consumer Protection Act, fraudulent inducement, actual fraud, constructive fraud and "vicarious liability". They prayed for damages "in excess of $200,000" under their warranty claim, in the amount of $500,000 for compensatory damages, in the amount of $350,000 for fraud-related damages, punitive damages, treble damages, costs, attorney's fees and other relief. Most importantly, Mr. and Mrs. Craig filed these claims, all which arise from the contractual relationship with Southampton, against Basheer Communities, Edgemoore Homes, L.L.C. ("Edgemoore"), Basheer/Edgemoore-Westhampton, L.L.C. ("Westhampton") and an amorphous partnership named "Basheer & Edgemoore" (collectively, "Defendants"), allegedly consisting of four (4) "partners" Southampton, Basheer Communities, Edgemoore and Westhampton.[1]

On or about March 5, 2004, Defendants filed a Demurrer and Plea in Bar to the Motion for Judgment. On July 16, 2004, the Trial Court sustained the Demurrer in part, granted Mr. and Mrs. Craig leave to amend, and reserved the issues presented in the Plea in Bar for an evidentiary hearing after the filing of an Amended Motion for Judgment. On August 16, 2004, Mr. and Mrs. Craig filed their Amended Motion for Judgment, their fourth attempt at properly stating claims in this matter. On September 3, 2004, Defendants filed a

1. This Brief in Opposition is filed on behalf of Respondents, Basheer/Edgemoore-Southampton, L.L.C., Basheer/Edgemoore-Westhampton, L.L.C., Edgemoore Homes, L.L.C. and "Basheer & Edgemoore". Diane Cox Basheer Communities, Inc. will be filing its own Brief in Opposition with this Court.

Demurrer and Plea in Bar to the Amended Motion for Judgment. On December 9, 20^4, the Trial Court heard argument on the Demurrer and Plea in Bar, for the fourth time in this litigation.

After reviewing detailed briefs and hearing lengthy argument from counsel, the Trial Court properly relied on the express language of the Agreement, attached to the Amended Motion for Judgment as Exhibit 1, in holding that Southampton was the only proper party to the claims alleged by Mr. and Mrs. Craig. Furthermore, in dismissing the claims for fraud, constructive fraud and violation of the Virginia Consumer Protection Act, the Trial Court properly relied on a contractual merger clause, the economic loss rule and the fact that fraud-related claims must allege a misrepresentation of a present, pre-existing fact under Virginia law.[2] Based upon the Trial Court's rulings, Mr. and Mrs. Craig were left with a breach of express warranty claim against Southampton.

Astoundingly, in the wake of these rulings, *Mr. and Mrs. Craig voluntarily dismissed with prejudice their breach of express warranty claims against Southampton.*[3] As a result

2. The Trial Court also dismissed the claim for "Vicarious Liability" for the reason that there is no such recognized cause of action in Virginia. Mr. and Mrs. Craig did not challenge the Trial Court's ruling on this issue in their appeal to the Supreme Court of Virginia.

3. It is noteworthy that from the filing of the Original Litigation in 2002, Southampton has maintained that, at its core, this case was a simple, straightforward breach of warranty case. Mr. and Mrs. Craig and Southampton had each retained expert witnesses to testify regarding alleged construction defects in the house and the (Cont'd)

of this voluntary dismissal, the Trial Court entered a Final Order in this matter on December 28, 2004. Mr. and Mrs. Craig filed their Notice of Appeal to the Supreme Court of Virginia on January 25, 2005. The Supreme Court of Virginia denied Mr. and Mrs. Craig's Petition for Appeal on June 28, 2005.

REASONS FOR DENYING THE PETITION

1. Mr. and Mrs. Craig have not presented a proper claim under 28 U.S.C.A. § 1257(a) in that they have failed to present their federal claim to the state court that rendered the decision they wish to have reviewed.

Mr. and Mrs. Craig acknowledge in their Petition that the due process claim which provides the sole basis for the appeal to this Court has never been presented to the Supreme Court of Virginia. Petition, 24. However, they argue, citing *Bouie v. City of Columbia*, 378 U.S. 347 (1964), that when a state's highest court interprets a state law in a way that is unforeseen, unexpected or indefensible, it violates the aggrieved litigant's due process rights under the Fourteenth Amendment to the United States Constitution. This argument misstates the law and mischaracterizes the rulings of the Trial Court and the Supreme Court of Virginia. Mr. and Mrs. Craig's failure to present a federal claim to the Supreme Court of Virginia is fatal to their Petition under 28 U.S.C.A. § 1257(a).

(Cont'd)

appropriate warranty standards under the express warranty provided by Southampton. However, instead of pursuing at trial the warranty claims that made up the heart of their case, Mr. and Mrs. Craig elected to dismiss their warranty claims, with prejudice.

In order for a litigant to appeal properly a judgment from a state's highest court, they must first present their federal claim to the state court whose decision is to be reviewed. *Adams v. Robertson*, 520 U.S. 83, 86 (1997). Specifically, 28 U.S.C.A. § 1257 (a) provides, in relevant part, that:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . .

When the highest state court is silent on a federal question before the Supreme Court, the Supreme Court assumes that the issue was not properly presented. *Adams*, 520 U.S. at 86-7, *citing, Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987). The aggrieved party bears the burden of overcoming this assumption by demonstrating that the state court had an opportunity to address the federal question presented to the Supreme Court. *Board of Directors*, 481 U.S. at 550; *Webb v. Webb*, 451 U.S. 493, 501 (1981).

Mr. and Mrs. Craig argue that because the Trial Court and the Supreme Court of Virginia adopted an "unforeseen and unexpected reading of Virginia Code Section 50-73.98", they fit within a "rare exception" to 28 U.S.C.A. § 1257(a), in that their due process rights were violated as a result of these rulings. Petition, 26. This argument fails for three (3) reasons. First, Mr. and Mrs. Craig failed to present the federal

question at issue in their Petition to the Supreme Court of Virginia, even though it was available to them after the rulings of the Trial Court. Second, the cases relied upon by Mr. and Mrs. Craig for this proposition are distinguishable and inapposite. Third, the rulings of the Trial Court and the Supreme Court of Virginia were not "unforeseen and unexpected", as more fully discussed in the following sections of this Brief.

As set forth above, a petitioner must present the federal question sought to be reviewed to the highest court in the state, in order for jurisdiction to exist in the Supreme Court under 28 U.S.C.A. 1257(a). This rule protects the interest of comity between the state courts and the Supreme Court. *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79 (1988). In *Adams*, this Court explained that:

> "[I]t would be unseemly in our dual system of government" to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider. *Webb*, 451 U.S., at 500, 101 S. Ct., at 1893 (citations and internal quotation marks omitted). Thus, the rule affords state courts "an opportunity to consider the constitutionality of the actions of state officials, and, equally important, proposed changes" that could obviate any challenges to state action in federal court. *Illinois v. Gates*, 462 U.S. 213, 221-222, 103 S. Ct. 2317, 2323-2324 (1983).

Adams, 520 U.S., at 91. However, relying on *Bouie*, Mr. and Mrs. Craig have argued that:

> [W]here State trial and appellate courts have interpreted their own State statute in a way that

> was unforeseen, "unexpected," or "indefensible by reference to the law which had been expressed prior to the conduct in issue," in order to deny the state-court litigant an opportunity to be heard on the substantive right affected, it violates that litigant's due process rights regardless of whether he has timely or properly raised the federal issue in the State court.

Petition, 25-26. This argument is misguided for a number of reasons. First, *Bouie* involved a criminal conviction, not a civil matter between two private parties as is present here.[4] Second, contrary to the implication put forth by Mr. and Mrs. Craig, the aggrieved party in *Bouie* presented Due Process and Equal Protection arguments to the South Carolina Supreme Court, prior to the appeal to this Court. *Bouie*, 378 U.S. at 349. As a result, the requirements of 28 U.S.C.A. § 1257(a) were satisfied in *Bouie*, unlike this case. Had Mr. and Mrs. Craig believed that the Trial Court interpreted Virginia law in a manner that was "unforeseen" or "unexpected" so as to violate their rights of due process, they were required by 28 U.S.C.A. 1257(a) to raise and present that issue to the Supreme Court of Virginia. They failed to do so. As a result, the Petition should be denied.

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4. It is noteworthy that the other cases cited by Mr. and Mrs. Craig in support of this position also involve criminal convictions, not civil matters. Furthermore, the common thread throughout many of these decisions was that they involved racial discrimination in the "unforeseen" and "unexpected" application of the criminal statutes. Clearly, the due process analysis involved in criminal cases with racial overtones is significantly different than the analysis involved in this case.

2. In sustaining the Demurrer related to the alleged "partnership" among the Defendants, the Trial Court, as affirmed by the Supreme Court of Virginia, properly considered the express language of the Agreement between Mr. and Mrs. Craig and Southampton, attached to the Amended Motion for Judgment as Exhibit 1.

The rulings by the Trial Court, as affirmed by the Supreme Court of Virginia, were well grounded in Virginia law and were not "unforeseen and unexpected". As a result, there was no violation of Mr. and Mrs. Craig's due process rights. The principal argument advanced on Demurrer by Southampton, Westhampton, Basheer Communities and Edgemoore[5] was that Mr. and Mrs. Craig had failed to state a claim against all Defendants, other than Southampton, the only party obligated under the terms and conditions of the Agreement. In their Amended Motion for Judgment, Mr. and Mrs. Craig alleged that they had entered into a contract with a "partnership", comprised of all Defendants. Mr. and Mrs. Craig also argued that they had alleged a partnership by estoppel among the Defendants. Defendants argued that the express language of the Agreement, attached to the Amended Motion for Judgment and properly before the Trial Court for its consideration on demurrer, directly contradicted Mr. and

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5. In the litigation in the Trial Court, "Basheer & Edgemoore", the fictitious partnership, joined in the Demurrer and Plea in Bar filed by the other Defendants. "Basheer & Edgemoore" and the other Defendants expressly stated that by joining in the Demurrers and Pleas in Bar, they were in no way admitting the existence of such a partnership. However, "Basheer & Edgemoore" did not want to be placed in the position of being in default before the Trial Court. Defendants filed an affidavit pursuant to Virginia Code §8.01-279, denying the existence of this fictitious partnership.

Mrs. Craig's legal conclusions. As a result, Mr. and Mrs. Craig had failed to state a claim against Westhampton, Basheer Communities, Edgemoore and "Basheer & Edgemoore".

The legal standards by which a demurrer must be governed under Virginia law are straightforward. A demurrer admits the truth of all material facts properly pleaded. Under this rule, the facts admitted are those expressly alleged, those which fairly can be viewed as impliedly alleged, and those which may be fairly and justly inferred from the facts alleged. *CaterCorp, Inc. v. Catering, Inc.*, 246 Va. 22, 24, 431 S.E.2d 277 (1993). *See Dade v. Anderson*, 247 Va. 3, 5, 439 S.E.2d 353 (1994); *Palumbo v. Bennett*, 242 Va. 248, 249, 409 S.E.2d 152 (1991); *Rosillo v. Winters*, 235 Va. 268, 270, 367 S.E.2d 717 (1988); *Bowman v. State Bank of Keysville*, 229 Va. 534, 536, 331 S.E.2d 797 (1985); *Penick v. Dekker*, 228 Va. 161, 166, 319 S.E.2d 760 (1984). The Trial Court may examine not only the substantive allegations of the pleading but also any accompanying exhibit mentioned in the pleading. *Flippo v. F&L Land Co.*, 241 Va. 15, 17, 400 S.E.2d 156 (1991). A Trial Court considering a demurrer may ignore a party's factual allegations contradicted by the terms of authentic, unambiguous documents that properly are a part of the pleadings. *Ward's Equipment, Inc. v. New Holland North America, Inc.*, 254 Va. 379, 383, 493 S.E.2d 516, 518 (1997); *Fun v. VMI*, 245 Va. 249, 253, 427 S.E.2d 181, 183 (1993). Unlike a motion for summary judgment, a demurrer does not allow the Trial Court to evaluate and decide the merits of a claim. It only tests the sufficiency of factual allegations to determine whether the complaint states a cause of action. *Fun*, 245 Va. at 252, 427 S.E.2d at 182. However, a demurrer does not admit the correctness of the pleaders conclusions of law. *Commercial Construction Specialties,*

Inc. v. ACM Construction Management Corp., 242 Va. 102, 103, 405 S.E.2d 852 (1991); *Fox v. Custis*, 236 Va. 69, 71, 372 S.E.2d 373 (1988); *Ames v. American National Bank*, 163 Va. 1, 176 S.E. 204 (1934).

In this case, the Trial Court did not commit error by "considering matters outside the pleadings and by not considering the plaintiffs' Amended Motion for Judgment in the light most favorable to the plaintiffs" as Mr. and Mrs. Craig argued in their Petition for Appeal to the Supreme Court of Virginia. Rather, the Trial Court properly considered the express language of the Agreement, an exhibit to the Amended Motion for Judgment. The Agreement states in its first sentence that it is "by and between Basheer/Edgemoore-Southampton, L.L.C., trading as Basheer & Edgemoo[illegible] (hereinafter referred to as "Seller"), and Stephen V. and Un Sun H. Craig (hereinafter referred to as "P[illegible]chaser") . . ." There is no reference to Westhampton, Basheer Communities, Edgemoore or a "Basheer & Edgemoore" partnership. In fact, "Basheer & Edgemoore" is plainly identified as a trade name for Southampton.

The Agreement demonstrated to the Trial Court that Westhampton, Basheer Communities, Edgemoore and "Basheer & Edgemoore" never had any contractual or legal relationship with Mr. and Mrs. Craig. Westhampton, Basheer Communities, Edgemoore and "Basheer & Edgemoore" were not direct parties to any of the contracts, closing documents, warranties and other related documents executed by the seller and the purchasers in connection with the Property. Southampton was the entity responsible for the development of the Southampton subdivision and the only proper party to any of the claims alleged in the Amended Motion for Judgment. Westhampton, Basheer Communities, Edgemoore

and "Basheer & Edgemoore" had nothing to do with the facts and circumstances allegedly giving rise to Plaintiffs' claims.

The *Agreement* set forth the duties and responsibilities of Mr. and Mrs. Craig and Southampton with respect to the warranty related to the Property. Yet, all Defendants were made parties to the breach of warranty claim in the Amended Motion for Judgment. The *Agreement* between Mr. and Mrs. Craig and Southampton established the "consumer transaction" which must be alleged in order to state a claim for violation of the Virginia Consumer Protection Act. Yet, all Defendants were made parties to the Consumer Protection Act claim in the Amended Motion for Judgment.[6]

Fortunately, the Trial Court properly relied on the Supreme Court of Virginia's holding in *Ward's Equipment*, considered the plain language of the Agreement and ignored the factual allegations that were contradicted by the terms of

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6. Plaintiffs alleged all of their claims against a non-existent partnership, "Basheer & Edgemoore", instead of making specific allegations against Southampton, Westhampton, Basheer Communities and Edgemoore. The reason for this creative style of pleading is obvious. Plaintiffs could not identify any specific acts and omissions of the other Defendants, with the exception of Southampton as the party to the Agreement, which would give rise to their theories of liability. So, they used "Basheer & Edgemoore", a fictitious trade name, and the presumptions on demurrer, in an attempt to hide these obvious defects. This approach was a transparent attempt to sue as many entities as possible, irrespective of their actual involvement in this transaction. In the meantime, Westhampton, Basheer Communities, Edgemoore and "Basheer & Edgemoore" were faced with the burden to defend each and every allegation in the Amended Motion for Judgment because Plaintiffs failed to specify which claims were attributable to which Defendants.

this authentic, unambiguous exhibit. In *Ward's Equipment*, the Supreme Court of Virginia held that:

> [T]he court in ruling on the demurrer may properly consider the facts alleged as amplified by any written agreement added to the record on the motion. *Hechler Chevrolet, Inc. v. General Motors Corp.*, 230 Va. 396, 398, 337 S.E.2d 744, 746 (1985). Furthermore, and significant in this appeal, a court considering a demurer may ignore a party's factual allegations contradicted by the terms of authentic, unambiguous documents that properly are a part of the pleadings.

See Fun v. Virginia Military Institute, 245 Va. 249, 253, 427 S.E.2d 181, 183 (1993). *Ward's Equipment*, 254 Va. at 382-3, 493 S.E.2d at 518.

Specifically, in this case, the Trial Court observed that: "[T]he actual contract which is appended to [Plaintiffs'] pleading and was made part of it, does not indicate a partnership at all." December 9, 2004 Hearing Transcript ("Transcript"), 13. Furthermore, the Trial Court ruled that:

> I think that the contract as argued by counsel is definitive. It states who the party is. It does not state it is a partnership. . . The contract was signed by the plaintiff. The plaintiff is deemed to know who the contracting party is and – by law, and as a matter of law relies on what the contract says about who the parties are.
>
> So, there is no partnership by estoppel pled here, and I'll sustain the demurrer on that ground.

Transcript, 23.

Notwithstanding this appropriate analysis by the Trial Court, Mr. and Mrs. Craig argue that the Trial Court was obligated to accept their legal conclusion that the Defendants "operated as a partnership by estoppel." This argument is directly contrary to Virginia law. Under Virginia law, a demurrer does not admit the correctness of the pleaders conclusions of law. *Commercial Construction Specialties, Inc. v. ACM Construction Management Corp.*, 242 Va. 102, 103, 405 S.E.2d 852 (1991); *Fox v. Custis*, 236 Va. 69, 71, 372 S.E.2d 373 (1988); *Ames v. American National Bank*, 163 Va. 1, 176 S.E. 204 (1934). An allegation that Defendants operated as a partnership by estoppel is a mere legal conclusion which was properly disregarded by the Trial Court.

Mr. and Mrs. Craig also argued that Defendants should not have been heard to deny the existence of a partnership. However, once again, Mr. and Mrs. Craig misapplied Virginia law in this analysis. On demurrer, Defendants did not deny the existence of a partnership. Rather, they challenged whether Mr. and Mrs. Craig had made proper allegations regarding the alleged "partnership". Based upon the allegations contained in the Amended Motion for Judgment and the express language of the Agreement, the Trial Court properly disregarded Mr. and Mrs. Craig's mere legal conclusions and ignored those allegations which were directly contrary to the Agreement, in holding that there was no partnership or partnership by estoppel properly alleged in the Amended Motion for Judgment. For all of these reasons, the Trial Court and the Supreme Court of Virginia properly applied Virginia law in making the multiple rulings against Mr. and Mrs. Craig in this case. As a result, there clearly was no violation of Mr. and Mrs. Craig's due process rights under the Fourteenth Amendment.

3. In sustaining the Demurrer related to all fraud-related claims, the Trial Court, as affirmed by the Supreme Court of Virginia, properly relied on the valid and enforceable merger clause in the Agreement, on the economic loss rule and on Mr. and Mrs. Craig's improper allegations regarding misrepresentations related to future performance and statements of opinion.

In sustaining Southampton's Demurrer to Mr. and Mrs. Craig's claims for fraudulent inducement, actual fraud, constructive fraud and violation of the Virginia Consumer Protection Act, the Trial Court relied, in part, on the language of a merger clause contained in the Agreement. Specifically, paragraph 19 of the Agreement states that:

> All understandings and agreements heretofore made between the parties are merged into this Agreement, which expresses the entire agreement between the parties hereto, and no representations, oral or written, not contained herein shall be considered a part of this Agreement. This Agreement may not be altered, enlarged, modified or changed except by an instrument in writing executed by all parties hereto. Purchaser acknowledges that no one has the authority to make and no one has made any statements or representations which have been relied upon by Buyer which modify or add to the terms and conditions set forth herein, including any statements relating to the existence, condition, use or development of nearby property, roads or open space, except as may be expressly set forth in an

> exhibit or an endorsement hereto. The provisions hereof shall survive the delivery of the deed and shall not be merged therein.

Furthermore, paragraph 25(b) states that:

> Purchaser hereby represents to Seller that Purchaser has not relied and is not relying on any warranties, promises, guarantees or representations made by Seller, any Agent of the Seller, or anyone else acting on behalf of Seller, with respect to the Purchase by Purchaser of the Property and the other matters set forth herein unless specifically reduced to writing and made a part of this Agreement.

Based in part upon this language, the Trial Court ruled that Mr. and Mrs. Craig had failed to state proper claims for fraudulent inducement, actual fraud, constructive fraud and violation of the Virginia Consumer Protection Act, in that their allegations of misrepresentations were expressly contradicted by the terms of the Agreement.

Mr. and Mrs. Craig argued in their Petition for Appeal to the Supreme Court of Virginia that fraud is not protected by a contractual merger clause. However, the authorities upon which they relied all related to merger by operation of law. In neither case was there a contractual merger clause involved, as there is in this matter. Furthermore, it was not solely the merger of obligations into the deed or into the Agreement that caused the Trial Court to disregard allegations of fraud, but rather the express representation made by Mr. and Mrs. Craig to Southampton in the Agreement that they were not relying upon any statements or promises, oral or written, outside of what was contained in the Agreement.

In reviewing a contract attached as an exhibit to an Amended Motion for Judgment, the Trial Court must rely upon well-established rules of construction under Virginia law.

> It is the function of the court to construe the contract made by the parties, not to make a contract for them. The question for the court is what did the parties agree to as evidenced by their contract. The guiding light in the construction of a contract is the intention of the parties as expressed by them in the words they have used, and courts are bound to say that the parties intended what the written instrument plainly declares.

W.F. Magann Corp. v. Virginia-Carolina Electrical Works, Inc., 203 Va. 259, 263, 123 S.E.2d 377, 381 (1962). *See Brooks v. Bankson*, 248 Va. 197, 204, 445 S.E.2d 473, 477 (1994); *Christopher Associates, L.P. v. Sessoms*, 245 Va. 18, 22, 425 S.E.2d 795, 797 (1993); *Ross v. Craw*, 231 Va. 206, 212, 343 S.E.2d 312, 316 (1986); *Wilson v. Holyfield*, 227 Va. 184, 187, 313 S.E.2d 396, 398 (1984). When contract terms are clear and unambiguous, a court must construe them according to their "plain meaning". *Foods First, Inc. v. Gables Associates*, 244 Va. 180, 182, 418 S.E.2d 888, 889 (1992); *Winn v. Aleda Construction Co.*, 227 Va. 304, 307, 315 S.E.2d 193, 194 (1984).

In this case, the language of paragraphs 19 and 25(b) could not be more clear and unambiguous. Mr. and Mrs. Craig acknowledged and agreed that "no representations, oral or written, not contained herein shall be considered a part of

this Agreement." Furthermore, Mr. and Mrs. Craig acknowledged and agreed that they had not relied

> on any warranties, promises, guarantees or representations made by Seller, any Agent of the Seller, or anyone else acting on behalf of Seller, with respect to the Purchase by Purchaser of the Property and the other matters set forth herein unless specifically reduced to writing and made a part of this Agreement.

Considering this express language in one of the exhibits to the Amended Motion for Judgment, the Trial Court disregarded allegations of fraud, in that they were directly contrary to the representations made by Mr. and Mrs. Craig to Southampton in the Agreement. For these reasons, the Trial Court properly sustained Southampton's Demurrer with respect to the claims for fraudulent inducement, actual fraud, constructive fraud and violation of the Virginia Consumer Protection Act.

However, even if this ruling were misplaced under Virginia law, the Trial Court properly relied on the economic loss doctrine and the defects in Mr. and Mrs. Craig's allegations regarding the alleged misrepresentations upon which they based their claims. With respect to economic loss, under Virginia law, a party may only show both a breach of contract and a tortious breach of duty when the duty tortiously or negligently breached arises from a common law duty and not one existing between the parties solely by virtue of the contract. *Richmond Metropolitan Authority v. McDevitt Street Bovis, Inc.*, 256 Va. 553, 558, 507 S.E.2d 344, 347 (1998); *Foreign Mission Board v. Wade*, 242 Va. 234, 241, 409 S.E.2d 144, 148 (1991); *Spence v. Norfolk & W. R.R. Co.*, 92 Va.

102, 116, 22 S.E. 815, 818 (1895). This rule prevents every breach of contract action from turning into an action for fraud or negligence.

Recently, this rule was further clarified in the case of *Filak v. George*, 267 Va. 612, 594 S.E.2d 610 (2004). In *Filak*, plaintiffs appealed the Trial Court's sustaining of a demurrer to a claim for constructive fraud, based upon the economic loss rule. Plaintiffs alleged that the defendant insurance agent had made a series of representations to them regarding the terms and conditions of the insurance policy she would obtain for them. This Court affirmed, agreeing with the Trial Court that fraud is not actionable when such a claim essentially alleges negligent performance of contractual duties. Specifically, this Court stated that:

> Losses suffered as a result of the breach of a duty assumed only by agreement, rather than a duty imposed by law, remain the sole province of the law of contracts. The rationale for this rule lies in the distinctly different policy considerations distinguishing the law of torts from the law of contracts.
>
> The primary consideration underlying tort law is the protection of persons and property from injury, while the major consideration underlying contract law is the protection of bargained for expectations. Thus, when a plaintiff alleges and proves nothing more than disappointed economic expectations, the law of contracts, not the law of torts, provides the remedy for such economic losses.

Filak, 267 Va. at 618, 594 S.E.2d at 613.

In support of their claims for fraudulent inducement, actual fraud and constructive fraud, Mr. and Mrs. Craig only alleged improper performance of contractual duties. Specifically, Mr. and Mrs. Craig alleged improper characteristics, standards, grade, style and quality of construction, improper placing of utility lines, improper grading of their lot, failure to honor their desired termination of the Agreement and failure to honor their rights under the Warranty. All of these alleged "misrepresentations" actually reflect disappointed economic expectations that arise out of the Agreement. Under Virginia law, these claims clearly arise out of contract and not in tort. The Trial Court properly relied on this rule, in part, in sustaining Defendants' demurrers.

Furthermore, under Virginia law, a cause of action for fraud must be pleaded with particularity. *Tuscarora, Inc. v. B.V.A. Credit Corporation, et al.*, 218 Va. 849, 858-9, 241 S.E.2d 778, 783 (1978); *Welfley v. Shenandoah Iron, et al.*, 83 Va. 768, 3 S.E. 376, 378 (1887); *Gregory v. Peoples*, 80 Va. 355 (1885). In order to state a claim for fraud, a plaintiff must allege: (1) a false representation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party misled, and (6) resulting damage to the party misled. *Meridian Title Insurance Co. v. Lilly Homes, Inc. et al.*, 735 F. Supp. 182, 185 (E.D. Va. 1990); *Winn v. Aleda Construction Co.*, 227 Va. 304, 305, 315 S.E.2d 193, 195 (1984). In a claim for constructive fraud, the false representation of a material fact is made innocently or negligently in such a way as to induce a reasonable person to believe it. *Blair Construction, Inc. v. Weatherford*, 253 Va. 343, 346, 485 S.E.2d 137, 139 (1997); *Mortarino v. Consultant Engineering Services, Inc.*, 251 Va. 289, 295, 467 S.E.2d 778, 782 (1996); *Nationwide Mut. Ins. Co. v. Hargraves*, 242 Va. 88, 92, 405 S.E.2d 848, 851 (1991).

The misrepresentations upon which a plaintiff relies must be representations or present, pre-existing fact. *See McMillion v. Dryvit Systems, Inc.*, 262 Va. 463, 471, 553 S.E.2d 364, 369 (2001); *Mortarino v. Consultant Engineering Services, Inc.*, 251 Va. 289, 293, 467 S.E.2d 778, 781 (1996). Furthermore, the facts out of which the fraud arises, including the identity of the person or persons making the misrepresentations, and the date and time that they were made, must be alleged as well as proven. *Tuscarora, Inc. v. B.V.A. Credit Corporation, et al.*, 218 Va. 849, 858, 241 S.E.2d 778, 783 (1978). These standards apply not only to causes of action for fraud and constructive fraud, but also to claims arising under the Virginia Consumer Protection Act. *Lambert v. Downtown Garage, Inc.*, 262 Va. 707, 714, 553 S.E.2d 714, 718 (2001).

In this case, the Amended Motion for Judgment was replete with defects under these standards. Initially, Plaintiffs did not properly apprise each Defendant of the claims against it. Because Mr. and Mrs. Craig made their allegations against all Defendants collectively under their "partnership" theory, it was impossible to decipher whether any specific Defendant had liability on these fraud claims. The Trial Court properly recognized that the Amended Motion for Judgment failed to apprise the Defendants of the claims against them.

Additionally, Mr. and Mrs. Craig failed to plead misrepresentations of present, pre-existing facts under the fraud-based counts. In *Patrick v. Summers*, 235 Va. 452, 454, 269 S.E.2d 162, 164 (1988) (quoting *Soble v. Herman*, 175 Va. 489, 500, 9 S.E.2d 459, 464 (1940)), this Court stated that: "'[F]raud must relate to a present or a pre-existing fact, and cannot ordinarily be predicated on unfulfilled promises or statements as to future events.'" *See also McMillion v.*

Dryvit Systems, Inc., 262 Va. 463, 471, 553 S.E.2d 364, 369 (2001); *Mortarino v. Consultant Engineering Services, Inc.*, 251 Va. 289, 293, 467 S.E.2d 778, 781 (1996). In setting forth their fraud-based claims, Mr. and Mrs. Craig relied upon representations that: (1) all other lots *would* have a higher premium than the lot purchased by the Plaintiffs, (2) that their lot *would* be flat with privacy, (3) that all utility lines *would* be buried underground, (4) that the home *would* be finished without material and design defects, and scores of other representations concerning other future promises or statements as to future events. These allegations did not form the basis for a claim of fraud or violation of the Virginia Consumer Protection Act. They were mere statements of future performance or opinion, and not pre-existing fact. As a result, the Trial Court properly sustained Southampton's Demurrer on these additional bases.

Try as they might, Mr. and Mrs. Craig have been unable to escape the clear and unambiguous language of their Agreement with Southampton. They were provided every opportunity to litigate their breach of warranty claims against Southampton, the party with whom they entered into the Agreement, yet they dismissed those claims *voluntarily*, with prejudice. Now, having dismissed their principal claim voluntarily, they come before the Supreme Court of the United States and argue that the Virginia courts have denied them their due process rights. Such a position is illogical and contrary to law, based on the long history of this case. The Trial Court and the Supreme Court of Virginia provided Mr. and Mrs. Craig with multiple opportunities to litigate their claims. The courts' rulings were well-grounded in Virginia law. For all of these reasons, the Petition for Writ of Certiorari filed by Mr. and Mrs. Craig should be denied.

CONCLUSION

For all of the foregoing reasons, Respondents, Basheer/Edgemoore-Southampton, L.L.C., Basheer/Edgemoore-Westhampton, L.L.C., Edgemoore Homes, L.L.C., and "Basheer & Edgemoore" respectfully pray that the Petition for Writ of Certiorari filed by Petitioners, Stephen Craig and Un Sun Craig, in this cause should be denied and that the rulings of the Supreme Court of Virginia and the Trial Court should be affirmed in all respects.

Respectfully submitted,

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No. 05-693

IN THE

Supreme Court of the United States

STEPHEN V. CRAIG AND UN SUN H. CRAIG, PETITIONERS

v.

DIANE COX BASHEER COMMUNITIES, INC.; EDGEMOORE HOMES, LLC; BASHEER/EDGEMOORE SOUTHAMPTON, LLC; BASHEER/EDGEMOORE-WESTHAMPTON, LLC; AND BASHEER & EDGEMOORE, A VIRGINIA GENERAL PARTNERSHIP,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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CASES

BRIEF IN OPPOSITION TO PETITION FOR *CERTIORARI*

COMES NOW, the Respondent, Diane Cox Basheer Communities, Inc., by counsel, and for its Brief in Opposition to Petition for Writ of *Certiorari*, respectfully submits the following:

COUNTER STATEMENT

This matter arises out of an agreement to purchase real property improved with a new dwelling. The Petitioners, Stephen Craig and Un Sun Craig, allege that they entered into an agreement to purchase improved real property on May 20, 2000. The contract, which was attached by the Petitioners to the Motion for Judgment[1] and the Amended Motion for Judgment, and incorporated into the Motion for Judgment,[2] states that the contract is "by and between Basheer Edgemoore-Southampton, LLC, t/a Basheer & Edgemoor (hereinafter referred to as "Seller"), and Stephen V. and Unsun H. Craig (hereinafter referred to as "Purchaser")...".

Diane Cox Basheer Communities, Inc. demurred as to all Counts.[3] Diane Cox Basheer Communities, Inc. is alleged to have been a partner by estoppel in a

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[1]In Virginia, the initial pleading in an action at law is titled "Motion for Judgment". Va. Sup. Ct. Rule 3:3. Effective January 1, 2006, the initial pleading will be called a "Complaint". Va. Sup. Ct. Rule 3:2.

[2]*See* Va. Sup. Ct. Rule 1:4 (i).

[3]The current action was a refiling of a prior non-suited action. In the prior action, the defendants had filed Demurrers which had been sustained. (Tr. p. 49) *See* record in *Craig v. Basheer & Edgemoore*, Law No. 208859, Circuit Court of Fairfax County)

partnership with the same trade name as the seller: Basheer & Edgemoore. After extensive briefing and argument, the Court sustained the Demurrers by Order dated June 16, 2004, and granted the Petitioners thirty days to amend. An Amended Motion for Judgment was subsequently filed.

Diane Cox Basheer Communities, Inc. filed a Plea in Bar based on Petitioners/Appellants' failure to timely serve Defendants/Appellees with the Amended Motion for Judgment, as well as a Demurrer to the Amended Motion for Judgment. Once again, extensive briefs were filed concerning the Demurrer to the Amended Motion for Judgment, and oral argument was held before the Honorable Marcus D. Wiliams on December 9, 2004. The Plea in Bar was overruled. The Court sustained the Demurrers as to Diane Cox Basheer Communities, Inc., and dismissed all claims against Diane Cox Basheer Communities, Inc. The Court further sustained the Demurrers as to all other defendants concerning all claims, with the exception of the claims for breach of contract and breach of warranty against the seller identified in the written contract.

No Federal claims were raised in the initial pleadings. Count I of the Amended Motion for Judgment sought to recover against all defendants for a breach of contract and breach of warranty. In Count I, the Petitioners alleged that Diane Cox Basheer Communities, Inc., Edgemoore Homes, LLC, Basheer/Edgemoore Southampton, LLC, Basheer/Edgemoore Westhampton, LLC and "possibly other entities" all held themselves out to be general partners in a Virginia partnership trading as the name of "Basheer/Edgemoore". *See* Amended Motion for Judgment, ¶ 7. In oral argument, counsel for the Petitioners made it clear that the basis for the allegations

against Diane Cox Basheer Communities, Inc. was the creation of a partnership by estoppel. "That's our whole theory of this case, that this is a partnership by estoppel, and that we have got substantial – ". (Tr. p. 14).[4]

There were no allegations of any separate act or omission on the part of Diane Cox Basheer Communities, Inc., and no allegations that Diane Cox Basheer Communities, Inc.'s employees or representatives made any of the statements which form the basis for the fraud allegations. Diane Cox Basheer Communities' alleged liability was only by reason of the partnership by estoppel.

With respect to Count I, the Court sustained the Demurrer, finding that the effort to impose liability on Diane Cox Basheer Communities, Inc. for the contract to sell real property which it had not signed did not state a claim:

> "I think that the contract as argued by counsel is definitive. It states who the party is. It does not state it as a partnership, and if there were prior representations that it was a partnership, and paragraph 19 addresses those prior representations, and they are not part of the contract.

The contract was signed by the plaintiff. The plaintiff is deemed to know who the contract and party is and – by law and as a matter of law relies on what the contract says about who the parties are. So there is no partnership by estoppel pled here and I will sustain the

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[4] "Tr." refers to Transcript of the Hearing before the Circuit Court for Fairfax County on December 9, 2004.

Demurrer on that ground." (Tr. p. 23).

Count II sought to recover damages under the Virginia Consumer Protection Act. The Court sustained the Demurrer to Count II on the basis that Diane Cox Basheer Communities, Inc. was not a party to the consumer transaction and, therefore, could not be liable for a violation of the Virginia Consumer Protection Act. The Court further sustained the Demurrer on the basis that there was a lack of specificity of the allegations pled under the Virginia Consumer Protection Act. The Court found a number of conclusory statements, but not the kind of specificity the Court expects to see when making the type of allegation in question. (Tr. p. 48). The Court further found that much of what was pled dealt with future events and broken promises, but not misrepresentations of fact. (Tr. p. 48). The Petitioners/Appellants have not appealed the dismissal of Count II.

Count III sought to recover for fraud in the inducement. The specific allegations that were the subject of the fraud were: that the yard surrounding the house would be flat (Amended Motion for Judgment, ¶ 79), that the house would be of the same quality as the model house (Amended Motion for Judgment, ¶ 80), that there were misrepresentations as to the characteristics, standards, quality and style of the house that would be built (Amended Motion for Judgment, ¶ 84), that the Petitioners would have certain rights under a warranty (Amended Motion for Judgment, ¶ 85), that after a contract was entered into, that the Petitioners did not have the right to repudiate the contract (Amended Motion for Judgment, ¶ 86), that the yard would be flat and there would be privacy (Amended Motion for Judgment, ¶ 87), that the utilities in the area would be underground (Amended Motion for Judgment, ¶ 88), that

other lots had a higher lot premium (Amended Motion for Judgment, ¶ 89), that the Seller was licensed to transact business (Amended Motion for Judgment, ¶ 90), and that a radon mitigation system was not installed in the house (Amended Motion for Judgment, ¶ 91). As to these allegations, the Defendants/Respondents demurred on the basis that they made references to future conduct, that they were references to opinions, of qualities and standards, as opposed to statements of facts, that the allegations were specifically controlled by the terms of the contract and that the misrepresentations were nothing more than the breach of the contractual obligations. The Defendants/Respondents argued that statements made after the contract was signed could not have induced the contract. The Court sustained the Demurrers to Count III, stating:

> "To summarize, in Count III, the allegations deal with future performance. Some are not very specific about misrepresentations, and even if they are specific, the merger clause would seem to address this and would indicate that there could not have been reliance upon misrepresentations because in the contract, you have a merger clause where the plaintiff acknowledges that it did not rely upon other representations outside the contract. I will sustain the Demurrer."

(Tr. p. 65).

The Petitioners did not appeal to the Trial Court the rulings dealing with the future performance, nor have the Petitioners appealed the ruling on the lack of specificity of the fraud allegations. Before the Virginia Supreme Court the Petitioners only appealed the trial Court's application of the merger clause. Count IV

sought to recover for actual fraud based on representations that there was a promise to install a radon mitigation system in the house and that system was not installed. (Amended Motion for Judgment ¶ 97). Count V sought to recover for constructive fraud for the same alleged failure to install a radon mitigation system. (Amended Motion for Judgment ¶ 107). The Defendants demurred for the same reasons as for Count III, and that fraud could not be predicated on failure to perform the contract. The Court found that the prior rulings also applied to Counts IV and V. (Tr. p. 73). The Petitioners did not appeal this ruling.

Finally, Count VI was titled "Vicarious Liability". The Court did not view Count VI as being an additional substantive cause of action. The Court found it was merely an expression of a theory of liability against all of the parties, but the Court had already ruled on that elsewhere and found it to be moot. (Tr. p. 73). The Petitioners have not appealed this ruling.

After the Court had sustained the Demurrers, the only issue left in the case was the breach of contract/breach of express warranties for breach of contract and breach of warranty. After the sustaining of the Demurrers, the Petitioners voluntarily dismissed the contract claims with prejudice.

REASONS FOR DENYING THE PETITION

A. Summary of Argument

No question or issue involving a violation of Federal law was raised at either the Trial Court or before the Virginia Supreme Court. To support the allegation of jurisdiction, under 28 U.S.C. § 1257 (a), the Petitioners have not identified the violation of any Federal law by

these Courts, but rather, assert that there has been an abdication of Virginia law on creation of partnership by estoppel, which deprives the Petitioners of their due process rights. As will be shown below, there was no change in Virginia law. Under Virginia law, partnership by estoppel requires allegations and proof of entering into an agreement based on relying on the existence of a partnership, and this theory of liability can only apply to the contract claims. There cannot be, as a matter of law, a reliance on the existence of a partnership in connection with tort allegations. As the Petitioners have dismissed with prejudice the claims for breach of contract against the Seller, no purpose would be served in allowing a case to proceed against Diane Cox Basheer Communities, Inc. for vicarious liability under a partnership by estoppel for a contract and warranty claim that has already been dismissed. The Court correctly ruled that Diane Cox Basheer Communities was not a party to the contract.

The Petitioners' sole argument is that the Court should have recognized a partnership by estoppel. Even if the Court were to recognize partnership by estoppel, which might create vicarious liability for Diane Cox Basheer Communities, Inc., there is no underlying claim still extant which could impose liability on Diane Communities, Inc. The Petitioners have chosen not to appeal the Court's ruling regarding the other theories of liability. Even if successful in having ths Court extend partnership by estoppel to tort cases, by not challenging the other grounds of the Court rulings, the Petitioners are barred from recovering.

B. No Federal Question Is Presented By the Virginia Courts' Valid Determination of State Law Issues

The United States Supreme Court's power to review decisions by the Virginia Supreme Court are limited to those cases involving questions of Federal law, or violation of the United States Constitution.

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257 (a). In an effort to obtain jurisdiction, the Petitioners allege a violation of due process of the law and argue that the alleged abdication of the state rules concerning imposing liability for a partnership by estoppel was unforeseen, unexpected, and an abdication of the law. Under the Petitioners' argument, it assumes that there was a failure to follow state law. Further, under their argument, every time a state changed its laws, litigants would have an alleged due process violation. In support of their argument, the petitions rely on *Bouie v. City of Columbia*, 378 U.S. 347 (1964). This case did not concern a change in interpretation of a law in